

## Market Libertarianism Entails Quasi-Contracts – a Reply to LeCocq

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At the end of "*Justice for Sale*" (FL Vol. 5 No. 2) I asked how any punishment is justified from within the market-libertarian viewpoint. This is different from asking for an underpinning of the viewpoint (which I also gave some ideas on). I accept Jon LeCocq's idea (FL Vol. 5. No. 3) that a more basic argument than my own for punishing criminals is that a society without such punishment would be less free generally. But we might push the argument back further still and argue that we want more such overall freedom because it makes for more welfare (I might then defend this welfarist position as a fundamental moral assumption). It is fair comment to point out that a defence of a position is less fundamental than it might be. But it is not necessarily a fault to ignore more basic principles. To always use them would soon become tedious and might fail to give people the flavour of the new mode of thought that one wants to convey.

In a libertarian society legal controversy would not focus on utilitarian considerations. The welfare superiority would have to be a background assumption for the most part. Neither would law focus on what maximises overall freedom, for that would also make for a philosophical level of discussion that would be out of place in ordinary dealings. The quasi-contractual view of crime and punishment was being offered as an argument for those people who already take the value of liberty for granted but who see all punishment as rather like the initiation of aggression. I argued that it is more like the enforcement of a contract. so libertarians do not need to be so uneasy about punishment. When asked if we can give a demonstration that punishment leads to a freer society overall we can first reply that it is *part* of a free society (in the libertarian sense) that contracts are enforced, and enforcing such quasi-contracts is also a part.

On the face of things, then, the libertarian view ought to conceptually comprise this attitude to punishment rather than to have it as a mere contingent method of realising contractarian liberty. A society without punishment according to the levels that people pay to see enforced would be less free. But it would be less free not merely because the absence of the *contingent* "deterrent and restrictive effects of punishment". It would be less free because to deny people the right to 'price' crimes as they choose to would necessarily violate the properly-contractual conception of freedom. To put a limit on permissible punishment is analogous to putting limits on the price of any product in the market. We can defend quasi-contractual punishment with the same sorts of arguments that we use to attack price controls. But my real point is logical rather than contingent. So if it is correct then it is even more 'safe' than the approach Mr LeCocq suggests.

I do not suggest that with quasi-contractual punishment "this coercion is in one sense no coercion". Coercion is force and threat of force, and punishment usually involves that. But such punishment is not the violation of libertarian property rights; it is the enforcement of them.

We are told that a "contract requires consent and there are no partners." But it is obvious that there are partners to this quasi-contract: the criminal and the person who 'charges the price' for the crime against him. A diner's intention and willingness to pay has nothing to do with whether he has a contract or not. Even if he always intended to run from the restaurant he would still have a (tacit) contract. I suggest that the same applies to criminals.

I do not hold that quasi-contracts occur by one simply putting oneself into a situation where something is liable to happen. Going for a walk late at night does not produce a quasi-contract to be mugged, because the mugger does not have any moral right to what he takes. The correctness of libertarian property rights is presupposed. If it were not then there might be a good analogy between the mugger and the muggee.

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A criminal who chooses to commit crimes in a society with Draconian punishments would not be able to find an agency to protect him - or it would not be such a society. Similarly, individuals who chose to live in gentler societies would not find an agency to enforce amputation of a hand for theft. I do not see that individuals would be able to dictate just any price they like, any more than they could insist that someone buy a car from them at ten times the going rate. There would be a quasi-market price for punishments. and if they didn't like it they would have to go elsewhere.

In some sense the individual's property rights are being overridden by the majority here, but without this people could not set up alternative societies if they wished to - and to live in such a society in the first place is to quasi-contract into the rules that they enforce. I did not state that "no individual is entitled to decide for any other" on the question of punishment; I stated that we are individually "quite incompetent to decide for everyone else". I admit that there is a majoritarian element to the market, but it is not as arbitrary as democracy (or any other system of rule), and people can more easily set up separate communities in competition.

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